No. 85-6756

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

JAMES ERNEST HITCHCOCK,
Petitioner,

v.

LOUIE L. WAINWRIGHT, SECRETARY,
FLORIDA DEPARTMENT OF CORRECTIONS,
Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY BRIEF FOR PETITIONER

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I FLORIDA'S PRE-*LOCKETT* CAPITAL SENTENCING STATUTE OPERATED IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS BY ENFORCING THE "MANDATORY LIMITATION" THAT ONLY THOSE MITIGATING CIRCUMSTANCES "ENUMERATED" IN THE NARROW STATUTORY "LIST" COULD BE CONSIDERED

In responding to Mr. Hitchcock's claim under *Lockett* v. *Ohio*, 438 U.S. 586 (1978), Wainwright has failed to answer the fact that the constitutional deficiencies in the Florida law at the time acted in this case to deny what the Eighth Amendment demands. Wainwright does not deny that the Florida capital sentencing statute was intended by the Florida legislature to restrict consideration of mitigating circumstances to the factors enumerated in the statute. Instead he urges the Court to disregard that legislative history. He does not deny that the Florida Supreme Court in *Cooper* v. *State*, 336 So.2d 1133 (Fla. 1976), confirmed that this was the intent of the legislature. Instead he urges the Court to read ambiguity into the holding of *Cooper*—where there is none—and to find that the *Cooper* court's concern for the relevance of mitigating evidence was the same as the Court's concern for relevance in *Lockett*. He does not deny that the record in this case may reflect counsels' and the trial court's belief that the consideration of nonstatutory mitigating evidence was severely limited under Florida law. Instead he urges the Court to hold that so long as this limitation was not absolute—so long as one "single bit" of nonstatutory mitigating evidence was proffered and not excluded—there could be no violation of the Eighth Amendment rule of *Lockett*. When each of Wainwright's arguments is analyzed, the strength of Mr. Hitchcock's *Lockett* claim is not only unrebutted but is further confirmed.

The major thrust of Wainwright's argument is that the Florida capital sentencing statute was never enforced to preclude the consideration of nonstatutory mitigating circumstances. To make such an argument, Wainwright first dismisses the legislative history restricting consideration of mitigating factors to the statute's list as being "of no consequence." BR 27.[1] Then, Wainwright says that despite what the legislature intended and despite what the statute said ("as enumerated"), in actuality the Florida Supreme Court applied a relevancy test for mitigating circumstances which was consistent with *Lockett* v. *Ohio*.

Mr. Hitchcock agrees that relevancy may have been the test applied by the Florida Supreme Court in *Cooper*, but its definition of relevancy was too narrow to be compatible with the broad test of relevancy articulated in *Lockett*. Mitigating evidence was not admissible in Florida unless it was strictly "relevant" to a *statutorily enumerated* mitigating circumstance:

> The *sole issue* in a sentencing hearing under Section 921.141, Florida Statutes (1975), is to examine in each case the *itemized* aggravating and mitigating circumstances. *Evidence concerning other matters have* (sic) *no place in that proceeding*.

Cooper v. *State*, 336 So.2d at 1139 (emphasis supplied). There was *"no place"* in Florida capital sentencing proceedings for any "evidence" that did not "concern" an "itemized" mitigating circumstance. This relevancy test was even narrower than that of the Ohio statute stricken in *Lockett* which allowed nonstatutory mitigating evidence to be presented but precluded its independent consideration. Wainwright's contention that Florida's test of

[1] References to the Brief for Respondent will be designated by the symbol "BR____."

relevancy was in harmony with the Eighth Amendment is thus defeated by the plain and unequivocal analysis of the Florida Supreme Court itself.

Wainwright's dismissal—as being "of no consequence"—of all that preceded *Cooper's* articulation of relevancy is equally unavailing. It is this history that not only led the Florida Supreme Court to its holding in *Cooper* but that also caused the Attorney General of Florida to advocate for the very result that the court reached in *Cooper*. The Attorney General's present attempt in Mr. Hitchcock's case to dismiss such a history as of no consequence—when the effect of that history upon reasonable lawyers and judges is the very issue presented by Mr. Hitchcock—is thus disingenuous.

In *Cooper* the argument was made by the defendant that he should have been allowed to present mitigating character evidence, such as his stable employment record, to demonstrate his potential for rehabilitation. In response the Attorney General urged that the argument be rejected because such evidence did not fall within the statutory list of mitigating circumstances:

> Appellant urges the court erred in refusing to allow "evidence" to be introduced to show the defendant was capable of being rehabilitated. *There is nothing contained in the statute which suggests "potential for rehabilitation" is a mitigating factor to be considered by the jury and/or sentencing judge*.

Cooper v. *State*, Brief of Appellee, at 33.[2]

[2] The Brief of Appellee was filed on July 17, 1975 in the Supreme Court of Florida, Vernon Ray Cooper v. *State of Florida*, Case No. 45,966. A copy of that brief has been provided to the Clerk of the Court.

Thus, the Florida Attorney General's present effort to persuade the Court to ignore the legal environment in which Mr. Hitchcock's counsel investigated, presented, and argued mitigating evidence, and in which the judge and jury considered mitigating evidence, must be rejected out of hand. It is nothing more than legal sleight of hand, based upon the need for a particular result rather than upon principled legal analysis. As the briefing in *Cooper* reveals, at the time of *Cooper* the Florida Attorney General also believed that Florida's capital statute limited permissible mitigating evidence to the narrow statutory list, and he urged that position upon the Florida Supreme Court as a basis for precluding consideration of relevant mitigating evidence. The Florida Supreme Court agreed with the Florida Attorney General's position—holding that such evidence was properly excluded under the statute's "mandatory limitation." The Florida Attorney General cannot so glibly dismiss this legislative and litigation history when his predecessors adopted the very same view of the Florida statute that Mr. Hitchcock's lawyer adopted.[3]

At bottom, Wainwright's distortion of the unequivocal holding of *Cooper*, his off-handed dismissal of the highly relevant pre-*Lockett* history of interpretation and application of the Florida statute, and indeed his incantation of the need for case-by-case review, are based upon a fundamental misunderstanding of the holding in *Lockett*. Most revealing of this fundamental confusion is Wainwright's

[3] Wainwright's criticism of this Court, the Court of Appeals, other courts and judges, and all legal commentators for "the ease" with which they have "'interpreted [*Cooper*] as limiting the introduction of mitigating circumstances to those enumerated in the statute,'" BR 22, rings hollow. The Florida Attorney General himself held that view and urged it upon the court; he cannot now fault others for agreeing with him.

position that "[a]s long as one single bit of non-statutory evidence was even attempted to have been introduced, the basis for [Mr. Hitchcock's *Lockett*] claim totally evaporates." BR 47. In Wainwright's view, unless counsel failed to proffer *any* of the available nonstatutory mitigating evidence, there can be no *Lockett* violation. Similarly, unless the trial judge excluded *altogether* the proffered nonstatutory mitigating evidence, there can be no *Lockett* violation. According to this view, so long as one scintilla of nonstatutory mitigating evidence is proffered by counsel and not explicitly excluded from evidence by the judge, there can be no *Lockett* violation.

This is an extreme position, acceptance of which would require the Court to overrule *Eddings* v. *Oklahoma*, 455 U.S. 104 (1982); and *Skipper* v. *South Carolina*, 106 S.Ct. 1669 (1986). In each of these cases more than "one single bit" of nonstatutory mitigating evidence was introduced and considered, but the Eighth Amendment mandate was nevertheless unsatisfied. The Eighth Amendment demands true individualized consideration at the selection stage of a capital case; such consideration demands that independent mitigating weight be given to all mitigating factors, not merely to "one single bit" of mitigation. Wainwright's argument is thus reflective of the erroneous interpretation of the *Lockett* mandate that has consistently characterized Florida's application of its restrictive statute.

In this light, Wainwright's repetitive reference to the few biographical facts that made it into Mr. Hitchcock's record is unavailing.[4] Though counsel for Mr. Hitchcock

[4] These facts have been discussed in Mr. Hitchcock's opening brief, and with one exception, need no further discussion in light of Wainwright's argument. The exception is that Wainwright, without record citation, says that the jury was presented with evidence of Mr. Hitchcock's background of extreme poverty. That is false; *no* such evidence was presented. *See* Brief for Petitioner, at 33 n.49.

did introduce these bits of nonstatutory mitigating evidence, he could have introduced much more nonstatutory evidence but for the limitation of Florida law. But for the limitation of Florida law, the jury and judge as well could have given independent weight to this evidence and counsel could have argued that such evidence alone might support a life sentence. At best the record reveals an inadequate attempt by counsel to shoehorn a few meager biographical facts into the narrow mold of the statutory mitigating factors that were under consideration by the jury and judge.

Despite Wainwright's efforts, therefore, the truth cannot be hidden. The truth is that Florida law was *intended* to restrict mitigating factors to those listed in the statute; the "mandatory limitation" in the statute was *enforced* by the Florida Supreme Court so as to meet the then-perceived mandate of *Furman;* and the record in this case shows that limitation in action. The result was a capital sentencing determination in this case that violated the letter and spirit of *Lockett*.

II THE CLAIM THAT THERE IS SYSTEMATIC RACE-OF-VICTIM-BASED DISCRIMINATION IN THE IMPOSITION OF DEATH SENTENCES IN FLORIDA CANNOT BE SUMMARILY DISMISSED WHEN THE STATISTICAL ANALYSIS PROFFERED IN SUPPORT OF THE CLAIM HAS SHOWN A LARGE RACE-BASED DISPARITY, AND TO A SIGNIFICANT EXTENT, HAS ELIMINATED THE MOST COMMON NONDISCRIMINATORY REASONS FOR IT

In response to the claim that there is systematic race-of-victim-based discrimination in the imposition of death sentences in Florida, Wainwright has made little effort to rebut Mr. Hitchcock's argument that he has alleged a prima facie case of discrimination under the Eighth and

Fourteenth Amendments. Instead Wainwright has sought to trivialize Mr. Hitchcock's claim, has argued that the Court's prior approval of Florida's capital sentencing procedure insulates it from such a claim, and has conjured up a parade of horribles that would be unleashed by a decision in Mr. Hitchcock's favor. None of these arguments detracts from Mr. Hitchcock's showing of a prima facie violation of his rights under the Eighth and Fourteenth Amendments. They should not, therefore, prevent the Court from reaching the serious constitutional questions presented.

Wainwright attempts to trivialize Mr. Hitchcock's claim by arguing that he has no real interest at stake since the discrimination he alleges is directed against black victims rather than white defendants:

> As the jury [sic] in each of the Florida and federal courts which considered or reviewed this case have determined, Hitchcock's conduct is deserving of the ultimate penalty; accordingly, he should not be heard to complain that his death penalty determination was improper because the lives of black victims have allegedly been devalued by our society in *other* cases.

BR 65 n.8 (emphasis in original). *See also* BR 76-78. Such an argument confuses the right that black victims or potential black victims might assert with the right asserted by Mr. Hitchcock.

While Mr. Hitchcock may not have any standing to assert the equal protection rights of black victims, he does not seek nor has he sought to protect those rights. Rather he seeks protection of *his own right*—guaranteed to him under the Equal Protection Clause and under the Cruel and Unusual Punishments Clause—not to be sentenced on the basis of impermissible or arbitrary racial considerations. The racial considerations that he alleges have

affected his sentence determination are plainly impermissible and arbitrary because they are the vestiges of a system of slavery, in which white-victim crimes were routinely punished more severely than black-victim crimes. Because his crime involved a white victim and because in Florida such crimes are far more likely to result in the imposition of death sentences, Mr. Hitchcock has alleged that there was at least a risk in his case that his sentence was based upon consideration of the victim's race.[5] The victim's race may well have acted as an additional aggravating factor that tipped the balance of sentencing considerations in his case toward death.

The attempt to trivialize such a claim has no place in our jurisprudence. Surely if there were direct evidence that Mr. Hitchcock's sentencing jury recommended death at least in part because of an expressed racial identity with

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[5] As Professor Gross has explained, "consideration" of the victim's race in a capital sentencing determination is likely an unconscious phenomenon based upon jurors' greater empathy for white victims.

> We are more readily horrified by a death if we empathize or identify with the victim, or see the victim as similar to a relative or friend, than if the victim appears to us as a stranger. In a society that remains segregated socially if not legally, and in which the great majority of jurors are white, jurors are not likely to identify with black victims or see them as family or friends. This reaction is not an expression of racial hostility, it is simply a reflection of an emotional fact of interracial relations in our society.

Gross & Mauro, *Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization*, 37 Stan. L. Rev. 27, 108 (1984). Though such racial consideration is unconscious, it can still be "intentional" for Fourteenth Amendment purposes. *See Alexander* v. *Louisiana*, 405 U.S. 625, 632 (1972) (" 'The result bespeaks discrimination, whether or not it was a conscious decision on the part of any individual jury commissioner' ") (quoting *Hernandez* v. *Texas*, 347 U.S. 475, 482 (1954)).

the victim, the State of Florida would not argue that such a recommendation was constitutionally tolerable. *See Zant* v. *Stephens*, 462 U.S. 862, 885 (1983) (if a state "attached the 'aggravating' label to factors that are constitutionally impermissible or totally irrelevant to the sentencing process, such as . . . the race . . . of the defendant . . . due process of law would require that the jury's decision to impose death be set aside").[6] That there is only circumstantial evidence, not direct evidence, that Mr. Hitchcock's sentencing decision was influenced by the victim's race—drawn from the systematic disparity in the imposition of death sentences in Florida that reflects the race of the victim as a significant factor in sentencing decisions—should lead to no different conclusion. For even if there is only a "substantial risk" that a death sentence may have been imposed arbitrarily, the sentence cannot stand, *Gregg* v. *Georgia*, 428 U.S. 153, 188 (1976).[7] And at the very least, Mr. Hitchcock has shown *prima*

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[6] In this context, consideration of the victim's race as an aggravating factor is also "constitutionally impermissible" and "totally irrelevant to the sentencing process."

[7] Given the constitutional necessity of heightened reliability in capital sentencing decisions, the Court has never required, since its decision in *Furman* v. *Georgia*, 408 U.S. 238 (1972), that there be anything more than "a substantial risk" of arbitrary imposition of the death sentence in order for a particular death sentence to be stricken, *See, e.g., Gardner* v. *Florida*, 430 U.S. 349, 357-59 (1977); *id.* at 363-64 (White, J., concurring); *Lockett* v. *Ohio*, 438 U.S. at 604-605; *Godfrey* v. *Georgia*, 446 U.S. 420, 427 (1980); *Beck* v. *Alabama*, 447 U.S. 625, 637-38 (1980); *Eddings* v. *Oklahoma*, 455 U.S. at 119 (O'Connor, J., concurring); *Zant* v. *Stephens*, 462 U.S. at 874, 884-85; *Barclay* v. *Florida*, 463 U.S. 939, 950 (1983); *California* v. *Ramos*, 463 U.S. 992, 999 (1983); *Caldwell* v. *Mississippi*, ____ U.S. ____, 105 S.Ct. 2633, 2647 (1985) (O'Connor, J., concurring); *Skipper* v. *South Carolina*, 106 S.Ct. at 1676 n.2 (Powell, J., concurring); *Turner* v. *Murray*, ____ U.S. ____, 106 S.Ct. 1683, 1687-88 (1986).

facie, sufficient to survive summary dismissal, a substantial risk that his sentence was in part the product of racially-based considerations. A claim of this sort cannot be trivialized.

The second argument that Wainwright makes in an effort to divert the Court from deciding the issues presented rests upon the premise that "Florida's reformed death penalty law was specifically validated against arbitrariness challenges by this Court [in *Proffitt* v. *Florida*, 428 U.S. 242 (1976)]." BR 76. Because of this "validation," Wainwright argues, the Florida statute is immune to attack on the basis of its systematically arbitrary application. But the Court's 1976 "validation" of the capital sentencing procedures of Florida, Georgia, and Texas manifestly did not insulate them from future claims that the procedures are applied systematically in an arbitrary or discriminatory fashion. At most, the Court decided in its 1976 cases that "[o]n their face these procedures . . . *appear* to meet the constitutional deficiencies identified in *Furman*." *Proffitt* v. *Florida*, 428 U.S. at 251 (emphasis supplied).

In the post-*Proffitt-Gregg-Jurek* era, the Court has emphasized that its approval of the facial validity of these states' capital sentencing procedures constitutes something less than a licensing of any and every result which they produce. Each state has "a constitutional responsibility to tailor *and apply* its law in a manner that avoids the arbitrary and capricious infliction of the death penalty," *Godfrey* v. *Georgia*, 446 U.S. at 428 (emphasis added); and the rationale underlying these cases "recognized that the constitutionality of [these states'] death sentences ultimately would depend on the [state] Supreme Court construing the statute and reviewing capital sentences consistently with . . . [the] concern [of *Furman*]." *Zant* v. *Stephens* [I], 456 U.S. 410, 413 (1982) (per curiam). Thus, for example, if "Georgia attached the 'aggravating' label to factors that are constitutionally impermissible or totally irrelevant to the sentencing process, such as . . . the race . . . of the defendant, . . . due process of law would require that the jury's decision to impose death be set aside." *Zant* v. *Stephens* [II], 462 U.S. at 885. Accordingly, *Proffitt* v. *Florida* is not the judicial panacea for the state that Wainwright now says it is.

The final diversionary tactic utilized by Wainwright is to dredge up the horrible consequences that he says would follow from a ruling in Mr. Hitchcock's favor. Two specific spectres are invoked: the "reasonable . . . assump[tion] that . . . invidious discrimination exists at all levels of criminal punishment necessitating the invalidation of all state penal statutes," BR 78; and the necessity of "reject[ing] *in toto* Florida's death penalty statute," BR 79. Despite Wainwright's incantations, neither of these dire consequences would follow from a ruling in Mr. Hitchcock's favor.

The invalidation of all state penal statutes would not be necessary in light of such a ruling. First, it is not "reasonable to assume" that the racial considerations operative in capital sentencing proceedings are also operative in non-capital proceedings. Indeed, the "empirical evidence of racial discrimination is considerably stronger and more consistent for capital punishment than for other criminal sanctions." Gross & Mauro, 37 Stan. L. Rev. at 123 (citing Kleck, *Racial Discrimination in Criminal Sentencing: A Critical Evaluation of the Evidence with Additional Evidence on the Death Penalty*, 46 Am. Soc. Rev. 783 (1981)). Moreover, the more reasonable assumption would be the opposite of Wainwright's assumption, for "there is a

unique opportunity for racial prejudice to operate but remain undetected" in a capital sentencing proceeding, in contrast to a non-capital proceeding, "[b]ecause of the range of discretion entrusted to a jury in [such a proceeding]." *Turner* v. *Murray*, 106 S.Ct. at 1687. Finally, even if there were the same racial considerations operative in non-capital proceedings, the Constitution would allow greater latitude for their operation. So long as there was only a *risk* of racially-influenced results, that risk could be tolerable in non-capital proceedings despite being intolerable in capital proceedings. *See Turner* v. *Murray*, 106 S.Ct. at 1688 & n.8 (distinguishing *Ristaino* v. *Ross*, 424 U.S. 589 (1976)).

Similarly, a ruling in Mr. Hitchcock's favor need not lead ultimately to the abolition of the death penalty in Florida. As explained in the Brief for Petitioner in *McCleskey* v. *Kemp* (No. 84-6811), at 107-09, at least under the Fourteenth Amendment, the state would be entitled "to prove that, because of the extreme aggravation of a particular homicide, a death sentence would have been imposed, irrespective of racial considerations." Thus, the State could presumably continue to carry out death sentences in cases of extreme aggravation.[8]

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[8] Although Wainwright invokes no other spectres, the State of California in its amicus brief has invoked a third spectre that requires a brief response. At pages 1-7 and 12-30 of its brief, California has gone to great lengths to paint a detailed picture of the burdensome discovery measures that might be invited in Florida and other states if the Court rules in Mr. Hitchcock's favor. This non-record picture should be viewed with extreme caution, for it is an advocate's painting and has apparently been exaggerated in a number of material respects. *See* Letter of Professor Richard A. Berk to Counsel for Petitioner Hitchcock (copy provided to Clerk of the Court).

More importantly, as Mr. Hitchcock argued in his opening brief, at 53-54, discovery procedures need not become cumbersome or unfairly burdensome if they are available only *after* a prima facie case has been alleged, if they are utilized to narrow the issues in dispute, and if they are undertaken with reference to factual issues already settled in the major studies of capital sentencing undertaken in Georgia and Mississippi.

For these reasons, Wainwright's arguments should not divert the Court from reaching the issue presented: whether the claim that there is systematic race-of-victim-based discrimination in the imposition of death sentences in Florida can be summarily dismissed as "wholly incredible" when the statistical analysis proffered in support of the claim has shown a large race-based disparity, and to a significant extent, has eliminated the most common non-discriminatory reasons for it.

CONCLUSION

For these reasons as well as for the reasons advanced in the Brief for Petitioner, petitioner respectfully requests that the Court vacate the judgment of the Court of Appeals and remand as requested in his opening brief.

Respectfully submitted,

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